No. 84187-0

SUPREME COURT
OF THE STATE OF WASHINGTON

KITTITAS COUNTY, a political subdivision of the State of Washington, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW), CENTRAL WASHINGTON HOME BUILDERS (CWHBA), MITCHELL WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO., TEANAWAY RIDGE, LLC, KITTITAS COUNTY FARM BUREAU, and SON VIDA II,

Petitioners,

v.

KITTITAS COUNTY CONSERVATION, RIDGE, FUTUREWISE, EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, and DEPARTMENT OF COMMERCE

Respondents.

KITTITAS COUNTY'S RESPONSE TO AMICUS BRIEF OF CITY OF ROSLYN

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October 6, 2010

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I. INTRODUCTION

Appellant Kittitas County, respondent before the Growth Management Hearings Board, submits this response to the amicus brief submitted by Roslyn supporting its position that Kittitas County's (County) development regulations comport with the Growth Management Act (GMA) Ch. 36.70A RCW. This brief will demonstrate GMA compliance in two basic areas of the County's development regulations- (1) rural densities, (2) and protection of quantity and quality of water.

II. ISSUES

The two issues relevant to Roslyn's amicus brief were denominated before the Hearings Board as Issues number two and four.[1] Issue number two stated "Does Kittitas County's failure to prohibit urban uses and urban development in rural areas in chapter 16.09, 17.12, 17.29, and 17.36 KCC and the failure to include standards to protect the rural area violate RCW 36.70A.020 (1-2, 8-10, 12), 36.70A.040, 36.70A.070, 36.70A.110, and 36.70A.130?"[2] The Hearings Board found that the issues relating to Performance-base Cluster Plats (Ch. 16.09 KCC) and the

1 Final Decision Order March 21, 2008 Hearings Board cause #07-1-0015 ("FDO") pages 15 and 26.
2 FDO at 15.

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Zoning Designation Map (Ch. 17.12 KCC) were abandoned by the Petitioners (Futurewise), and so were not decided in the FDO.[3] The Hearings Board found the remaining aspects of issue number two to be noncompliant with the Growth Management Act (GMA)[4] and the County appealed.[5] Kittitas County did not appeal any issues related to Planned Unit Development (PUD) or Cluster Platting from the Hearing Board cause number 07-1-0004c, it only appealed issues relating to the GMA-appropriateness of rural three-acre density.[6] Hence, the only issue relevant to Roslyn's amicus brief's discussion of rural density appealed by Kittitas County only concerns PUD's.

Issue number four stated "Does Kittitas County's failure to require that all land within a common ownership or scheme of development be included within one application for a division of land (KCC 16.04) violate RCW 36.70A.020 (6, 8, 10, 12), 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.130, and 36.70A.177?"[7] The Hearings Board found that "Kittitas County's KCC 16.04 fails to protect water quality and quantity as required

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3 FDO at 21.
4 FDO at 59.
5 Petition for Review in cause number 271234.
6 Petition for Review in cause number 265480.
7 FDO at 26.

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by RCW's 36.70A.020(10) and 36.70A.070(5)(c)(iv)"[8] and the County appealed.[9]

III. ARGUMENT

A. Factual Inaccuracies

Roslyn's motion to file its amicus brief, and the brief itself, contain numerous factual inaccuracies. The majority of Roslyn's motion and brief relate to a trio of PUD applications that are currently under consideration by Kittitas County.[10] It is important to note that, because these applications have not yet been decided by Kittitas County, they, by definition, are not a part of the record in this matter. They have not been ruled upon or even considered by the Hearing Board. Nothing about them formed the basis for any of the issues on appeal here. Even if Roslyn accurately relayed facts about these application, which it does not, those facts did not form the basis for the County's decision that was appealed to the Hearings Board, nor the basis of the Hearings Board's decision that has been appealed to you. They are in no way properly before this court.[11]

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8 FDO at 31.
9 Petition for Review in cause number 271234.
10 Roslyn's motion at 3-4.
11 Despite the complete irrelevance of these three PUD applications to the matters on appeal here, the County does wish to correct the record as to them. The three PUD applications described on pages 3-4 of Roslyn's motion are respectively denominated as

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New issues may not be raised for the first time on appeal by amici curiae. *Harmon v. DSHS*, 134 Wn.2d 523, 544, 951 P.2d 770 (1998). Kittitas County accordingly asks the Court to disregard the brief filed by Roslyn.

The brief of Roslyn contains numerous factual inaccuracies. At page 3, Roslyn asserts the County appealed the Hearings Board's rulings as to PUD and cluster plats, when, as explained above, the County has only appealed a limited issue related to its PUD regulation. At page 3 of its brief, Roslyn asserts there is no evidence in the administrative record supporting the County's three-acre zoning, but such evidence does exist, and the County has drawn attention to it previously in its briefing. Kittitas County's public process used to amend its comprehensive plan produced testimony and evidence in the record supportive of the County's three-acre

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the Marion Meadows PUD in Easton, WA, the Black Gold PUD in Ronald, WA, and the No. 5 Canyon PUD in Cle Elum, WA. On page 4 of Roslyn's motion it describes each of these proposed PUD's as requiring urban services, yet they only require water (which is a rural service under the GMA) and none require sewer service (which is urban under the GMA), and so do not require urban services. On pages 4-5 of its motion, Roslyn alleges that that the Marion Meadows PUD, located 12 miles from Roslyn, affects its UGA without any support nor acknowledgement that it can comment as this project moves forward should it really believe it is impacted somehow. At pages 6-7 of its motion, Roslyn makes assertions about County approval despite the fact no such approval has yet occurred. Roslyn misrepresents that these developments will have water provided by exempt wells, when they are proposed to be served by class A systems with water rights. The assertion that the Marion Meadows PUD, 12 miles from Roslyn in Easton, will affect Roslyn's watershed is speculative at this time. The Marion Meadows PUD is actually annexed into the Easton Water District.

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zoning harmonizing the goals and objectives of the GMA.[12] The testimony found there by Lila Hanson, Pat Deneen, and Urban Eberhart from the Kittitas County Farm Bureau, are in accord that three-acre zoning preserves the rural character and promotes agriculture.[13] Their testimony is unified in its assertion that, by allowing farmers to sell off the smallest portion of agriculturally marginal land possible for cash flow purposes in low-irrigation years, it allows the farmer to remain economically competitive by being able to retain the greatest amount of productive farm land.[14] This allows farmers to retain the most agriculturally valuable farm land possible for subsequent better farming years, thereby promoting agriculture and preserving rural character.[15] Additionally, at page 9 of its brief, Roslyn asserts that proposals are going forward creating densities greater than surrounding municipalities, without any factual support whatsoever. There is nothing in the record in this matter that would support such a proposition. It is not the job of a court to search for authority for a party's arguments that are unsupported by authority. *Orwick v. Seattle,* 103 Wn.2d 249, 256, 692 P.2d 793 (1984). Without

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12 AR 1746-1779 attached to County's Opening Brief in cause number 271234 as Exhibit "A."
13 *Id.*
14 *Id.*
15 *Id.*

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citation to authority, it is presumed that none exists and the issue will not be judicially considered. *In re Rosier,* 105 Wn.2d 606, 616, 717 P.2d 1353 (1986).

On pages one and two of its brief, Roslyn asserts that the County's land use decisions have created a "*de facto*, unilateral adjustment to the City's UGA." There is no evidence in the record supporting the notion that urban services are being provided or required outside of urban areas, and so no impact upon municipalities to provide such services can be supported. Because the issue of impacts of development upon Roslyn has never been briefed nor ruled upon by the Hearings Board, it is not properly a part of this appeal. New issues may not be raised for the first time on appeal by amici curiae. *Harmon v. DSHS,* 134 Wn.2d 523, 544, 951 P.2d 770 (1998).

B. Misrepresentations of Law

1. Density

On page 2 of its brief, Roslyn asserts that the County has an obligation to ensure that new development will not adversely affect existing water rights. Roslyn cites to no authority for this proposition because none exists. As briefed in response to both the DOE and

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Earthjustice, RCW 90.03.290 provides the Department of Ecology the mandate and authority to protect existing water rights, yet Title 90 RCW creates no role or authority for a county to engage in such a consideration.

At pages 4 and 7 of its brief, Roslyn asserts that there is no limitation on PUD's, three-acre zoning, (and cluster plats, even though as to what Kittitas County appealed, that issue was abandoned before the Hearings Board and so not a part of this appeal.) Kittitas County's development regulations provide for additional controls on three acre-zoning that harmonize and foster the planning goals of the GMA. Any zoning designation must comport with KCC 17.04.020, which requires that the designation promote the "public health, safety, morals and general welfare" as well as comport with all other laws and regulations. AR 740. This promotes and harmonizes the health, safety, and economic development concerns voiced in the intent section of the GMA at RCW 36.70A.010. Similarly, KCC 17.98.020(5) requires that all rezones (a) comport with the comprehensive plan, (b) bear a substantial relationship to the public health, safety or welfare, (c) have merit and value for the County, (d) be appropriate due to a change in circumstance or reasonable development or need for more land in that zoning designation, (e) that

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land must be suitable for development in the sought zone, (f) not be a detriment to neighboring properties, and (g) not adversely impact irrigation delivery. AR 879. This harmonizes the GMA concerns for protection of rural character, economic development, protection of resource lands, prevention of sprawl, consistency, and provision for capital facilities. Finally, KCC 17.04.060 provides limits upon the amount of land in Kittitas County that can be in the various smaller rural zoning designations-3 to 5 %. This is substantially less than the 5.5% zoned greater than one dwelling per two acres that was not found to violate the GMA in *Thurston County v. WWGMHB*, 164 Wn.2d 329, 356, 190 P.3d 38 (2008).

Kittitas County's development regulations provide standards for PUD's and Cluster Platting that comply with the GMA. As PUD's are a zoning designation under the Kittitas County code, they must comport with both KCC 17.04.020 and 17.98.020(5), and so the exact same points made in the above paragraph regarding these code sections and three-acre zoning apply to PUD's. The Cluster Platting regulations specifically call for the protection of rural character and prevention of sprawl as required by the GMA, as well as protection of water resources by limiting the use

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of exempt wells and septic systems. KCC 16.09.010; AR 21. Similar GMA-required protection of rural character can be found at KCC 16.09.040(D) where the requirement that cluster plats comply with all existing regulations such as zoning, subdivision code, road standards, shoreline management, critical areas, and flood plains is found. AR 23.

At pages 5 and 6 of its brief, Roslyn asserts that various non-residential uses affect density such as restaurants, general commercial and retail. This is despite the fact that density is defined as dwelling units per acre (KCC 17.08.197), and therefore these uses are irrelevant to density calculation.

At page 6 of its brief, Roslyn takes issue with the County Transfer of Development Rights Program (TDR). This is despite the fact that Kittitas County's TDR Ordinance was just adopted in 2010, has never been adjudicated by the Hearings Board, is not present in the record in this matter, and is not a part of this or any appeal. Nothing about Kittitas County's TDR is before this or any court. New issues may not be raised for the first time on appeal by amici curiae. *Harmon v. DSHS,* 134 Wn.2d 523, 544, 951 P.2d 770 (1998).

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At page 7 of its brief, Roslyn fails to grasp the distinction between urban and rural bonus points. As should be clear, KCC 16.09.090 awards different amounts of bonus points to the same feature depending upon whether the development is in or outside of a UGA. If it is within a UGA, then it gets the urban point level, if out in the county, it gets the rural level. Roslyn misread the regulation to think the County was labeling these development features as urban. As is clear from the regulation, the County is not labeling these features as urban. The County is awarding different bonus amounts depending upon whether the development is within or outside the UGA.[16]

2. Water

Roslyn misrepresents state law and county code related to water in its Amicus brief. At page 11 of its Amicus brief, Roslyn asserts that the County has nothing in place to protect quantity and quality of water as required by the GMA. Besides the numerous provisions of the GMA that govern the County, and provide such protections, Kittitas County has

16 As was explained above, cluster plat issues (related to Ch 16.09 KCC) were abandoned at the Hearings Board level by Futurewise from Issue number two that the County appealed, and so are not amongst the issues the County is contesting here. The County only brings these points forward for clarity.

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numerous code provisions further protecting water that have already been described in its response to the DOE Amicus brief on pages 7-8 and 13-14.

At page 11 of its Amicus brief, Roslyn asserts that there is a problem with, or lack of authority for the notion of giving notice to other entities with specialized jurisdiction and expertise and relying upon their comments. Providing such notice and considering such comment is a requirement of the State Environmental Policy Act. RCW 43.21C.030(d), (g), and (h). It is a planning goal and specific requirement of the GMA. RCW 36.70A.020(11), 36.70A.035. It is also specifically required for counties planning under the GMA. RCW 36.70B.060(2). Hence, there is ample authority for the proposition that a county can and should send out notice to entities with different jurisdiction and expertise for comment, and consider that comment in making various decisions and that doing so fulfills a GMA requirement.

At page 12 of its brief, Roslyn expresses an ignorance of what is part of the GMA when it contends that complying with RCW 19.27.097 cannot equate with meeting a GMA mandate. It is important for the Court to remember that (1) not all of the GMA is found in Ch 36.70A RCW and that (2) the GMA spells out what a county must do to protect quantity and

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quality of water. The GMA was enacted in 1990 and is found in the 1st Extraordinary Session Ch 17 of the Session Laws of that year. The GMA contains specific requirements that explain how a county meets its obligation from RCW 36.70A.020(10) to protect the quantity and quality of water, and many of these requirements were not codified in Ch 36.70A RCW. Section 33 from the GMA provides that sewer and water systems must comport with comprehensive plans and is codified at RCW 36.94.040.[17] Section 34 of the GMA provides an extra 60 days for sewer districts to comply with comprehensive plans and is codified at RCW 56.08.020.[18] Section 35 from the GMA provides an extra 60 days for water districts to comply with comprehensive plans and is codified at RCW 57.16.010.[19] Section 51 of the GMA provides that plats and short plats can only be approved in accord with RCW 58.17.110 and amends RCW 58.17.060.[20] Section 52 of the GMA requires counties make a finding of provision of potable water prior to subdivision approval and amends RCW 58.17.110.[21] Perhaps most importantly, section 63 of the GMA creates RCW 19.27.097 and required an adequate supply of potable

17 1990 1st Ex. Sess. Ch. 17 §33.
18 1990 1st Ex. Sess. Ch. 17 §34.
19 1990 1st Ex. Sess. Ch. 17 §35.
20 1990 1st Ex. Sess. Ch. 17 §51.
21 1990 1st Ex. Sess. Ch. 17 §52.

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water before a building permit can be issued.[22] Hence, all of these sections of the RCW are part of the GMA even though not codified under Ch. 36.70A RCW and by meeting those requirements, a county fulfils its GMA obligation to protect quantity and quality of water. This comes down to two questions at the platting and building permit stage-is the amount of water adequate and is the water potable? As has already been described in the County's response to DOE, adequacy is guided by the State Health Department rules and policies, and potability is satisfied by passing a bacteriological test required by County code. Whether one legally has the right to use water is reserved in Title 90 RCW for the DOE in an action before the Superior Court. Nothing in Title 90 RCW nor the GMA gives a county authority to determine whether one has a legal right to use water.

At page 13 of its brief, Roslyn mischaracterizes KCC 16.24.210. Contrary to Roslyn's contention, KCC 16.24.210 does require well logs and passing a bacteriological test. In describing what is required upon the face of a plat, KCC 16.24.210 requires in pertinent part "a statement as to the suitability of...public water supplies installed in the subdivision signed

22 1990 1st Ex. Sess. Ch. 17 §63.

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by the health officer." The language upon the face of the plat affirms that "Well information consisting of a well log, satisfactory bacteriological test and four hour draw down has been submitted and reviewed." The County code provisions provide that the County's GMA requirement that there be adequate and potable water at the subdivision and building permit stage is satisfied.

Roslyn similarly mischaracterizes the County's position on *Campbell & Gwinn* at page 14 of its brief. The County refers the Court to its discussion of *Campbell & Gwinn* already in the record at pages 13-14 of its response to the DOE. Simply speaking, the case stands for the proposition that multiple wells in a development constitute one withdrawal and will violate the Ch. 90.44 RCW exemption from permitting if requiring a combined output of over 5,000 gallons per day, and that that was properly determined by the Superior Court in an action brought by the DOE.[23] *Campbell & Gwinn* does not stand for the proposition that a county can or should deny a plat application or building permit based upon its estimation of whether the proposed provision of water fits within the exemption of Ch. 90.44 RCW because that determination is specifically

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23 146 Wn.2d 1, 21, 43 P.3d 4 (2002).

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reserved for the Superior Court to decide in an action brought by DOE (as was done in *Campbell & Gwinn*). County role and responsibility was not an issue in *Campbell & Gwinn*, indeed, Yakima County was not even a party to the action.

It is important to remember the issue in this case is whether the County violates the GMA by not requiring lists of lands in common ownership as part of a subdivision application. As has been explained previously in this brief, and in the County's responses to DOE and Earthjustice, the determination of what is a development, and so what constitutes one withdrawal, as in *Campbell & Gwinn*, is between the developer, DOE, and the Superior Court. That would be the determination that would benefit from having information of lands in common ownership. That determination does not involve a county, and so by not requiring information that would only be used to make a determination that a county does not make, the county cannot be violating the GMA. The GMA cannot be violated because a county does not require information that is useless to any determination it is called upon to make.

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IV. CONCLUSION

Kittitas County provides for appropriate rural densities and controls with its three-acre zoning and PUD's. The County does not violate the GMA's requirement to protect water resources by not requiring disclosure of land in common ownership in development application as such a requirement is not relevant to any determination the county makes. Furthermore, the County complies with the GMA requirement to protect quantity and quality of water by following the GMA requirements, many of which are not codified in Ch. 36.70A RCW, that require findings of adequacy and potability.

Respectfully submitted this 6th day of October, 2010.

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